Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1228

In The

Supreme Court of the United States

October Term, 1986

BILL BENTON

Petitioner,

v.

STATE OF ALABAMA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTION PRESENTED

1. Whether interjection by trial judge in criminal case on behalf of the prosecution viz a viz coaching the prosecuter as to the proper methods of introducing evidence constitutes a violation of the defendant's constitutional rights as guaranteed him by the Fifth and Fourteenth Amendments to the Constitution of the United States.

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OPINIONS BELOW

The petitioner was found guilty of the charge of selling, furnishing or giving away a controlled substance, to-wit: marijuana in the Circuit Court of Baldwin County, Alabama on October 4, 1984. On August 20, 1985, the Alabama Court of Criminal Appeals affirmed this conviction without rendering an opinion. The petitioner's Application for Rehearing was likewise denied without opinion by the Alabama Court of Criminal Appeals on October 8, 1985.

JURISDICTION

The judgment of the Alabama Supreme Court denying your petitioner's Petition for Writ of Certiorari was entered on November 22, 1985 without opinion. This court has jurisdiction to entertain this Writ of Certiorari under the provisions of 28 U.S.C. §1257.

STATUTES AND RULES OF COURT INVOLVED

The following are the Constitutional provisions involved on appeal:

U.S. CONST. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, excepting cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. XIV, §1

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 27, 1984, the Grand Jury for the Twenty-Eighth Judicial Circuit of Alabama returned a true bill against the petitioner-defendant, Bill Benton, charging with the sale, furnishing or giving of a controlled substance, to-wit: marijuana, in violation of the applicable Alabama statutes. Defendant appeared in person in open court and was arraigned March 7, 1984. (R. 202). Trial was had in this cause on October 3rd and 4th, 1984, in the Circuit Court of Baldwin County, Alabama. At the conclusion of this trial, the petitioner was found guilty of the charge of sale of a controlled substance. On that same day the court entered judgment on the jury's verdict. (R. 210).

Following a pre-sentence investigation, the petitioner-defendant was sentenced to ten (10) years in the state

penitentiary on November 29, 1984. On that date the petitioner-defendant gave his oral notice of appeal. On appeal to the Alabama Court of Criminal Appeals, the petitioner presented two issues for appellate review, the second of which is the question presented to this court, i.e. whether or not the petitioner-defendant's constitutional guarantee to a fair and impartial trial were violated by the trial judge interjecting himself as an advocate for the State during a crucial incamera hearing and as to the admissibility of certain evidence.

The exchange during the trial of this case which gives rise to the instant appeal was as follows:

THE COURT:
You take the recording and you have Marian go and listen to that thing and verify that that is the one that it is. You should have done this already.

MR. COMBS:
Yes, sir.

THE COURT:
Get moving.
You had better check that to see if it is January 14th, 1984.
Do you want to withdraw the Exhibit you put in: State's Exhibit Two?

MR. COMBS:
Yes, sir.

THE COURT:
All right. I will allow you to withdraw it. When you get Mrs. Myers on the stand, you have her to review that; see if that's a true and correct copy of the transcript. She is confused as to who made that statement marked "X"--whether it was a confidential informant or Mr. Benton.

MR. COMBS:
Yes sir. I'm with you.

THE COURT:
Now, Mr. Ball has some objections to make for the record.

MR. BALL:
We would respectfully object and except to Your Honor's tutoring, for lack of a better word, the District Attorney insofar as the admission or the probable admission of any tapes, transcripts, etcetera, and would reserve further objections, not on that ground, but as they go in and introduce or attempt to introduce. And we reserve those objections.

THE COURT:
Now, has Mr. Russell listened to that?

MR. COMBS:
Yes, sir.

THE COURT:
And can he identify it?

MR. COMBS:
Yes, sir.

THE COURT:
All right. You will have to put him back on and ask him that again. And I know you object to it, Mr. Ball. You got your objection on the record?

MR. BALL:
Yes, sir, I do.

MR. COMBS:
This is a true and correct conversation of the tape contained in this transcript.

MR. BALL:
Well, the transcript is not evidence. The tape itself is evidence.

MR. COMBS:
Do you have any objection to the chain of custody, where it's been?

MR. BALL:
Hell, no. That has nothing to do with the predicate of introducing the tape. You don't have to mark it. I don't have any problem with that at all. It could have been made by somebody who's not even in Court.

MR. COMBS:
Do you have any objection to the fact that this transcript is of the January 14th conversation?

MR. BALL:
Yes, sir, I do. That's just a matter of final argument. Introduce it, or whatever, AND I am going to object at the proper time. And we will take it up with the closing arguments.

MR. COMBS:
All right. We will put Bobby Russell and Marian back on.

THE COURT:
Right. You let him say he heard the tape, because he just did hear it. And then you ask him if it's a true and correct copy. You can put Lance on and do the same thing.

MR. BALL:
For the record, we renew our objections.

THE COURT:
All right.

(R. 102-105).

It is the petitioner's position that the trial court erred to reversal by continually playing the role of advocate for the state in this trial. This was improper as it destroyed the petitioner's right to trial by a fair and impartial jury.

REASONS FOR GRANTING THE WRIT

The accused has a valued right guaranteed him by the United States Constitution to have a fair and impartial judge preside over his trial thereby insuring as much as possible a fair and impartial jury. U.S. Const. amends V, VI and XIIII. Consequently, the trial judge must act as an impartial arbiter and not assume the position of advocate in the proceeding. Nordmann v. National Hotel Co., 425 F.2d 1103 (5th Cir. 1970). Stated differently, the trial judge is not present, nor is it his function to aid either party and certainly is under no duty to do so. Tharp v. Union State Bank, 364 So.2d 335, 337 (Ala.Civ. App. 1978). This principle arises out of the fundamental demand for justice and fairness because of the inherent injustice and chaos which would be engendered if trial judges were allowed to aid either

side, either while the jury was present, or, as in this case, incamera, during the hearing of a critical objection.

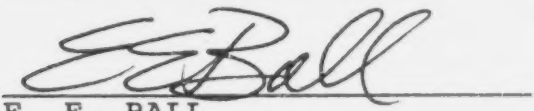
The trial court seriously infringed upon the petitioner's right to a fair and impartial trial and further denied the petitioner due process by continually aiding the prosecution in presenting their case. This error was affirmed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. The ruling of the state appellate court in this instance is repugnant to the constitution and incompatible with the previous decisions of this and other federal courts.

CONCLUSION

The petitioner submits that the issue posed above involved an important Constitutional consideration. This questions should therefore be resolved by this Court.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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January 17, 1986

CERTIFICATE OF SERVICE

I, E. E. BALL, the attorney for the petitioner, hereby certify that the number of copies of this petition required by Rule 28 of the Supreme Court Rules have been served on the opposing party in this proceeding by mailing three copies of the petition to the Attorney General of the State of Alabama, by certified mail,

return receipt requested, first-class postage prepaid, addressed to The Honorable Charles A. Graddick, Attorney General of the State of Alabama.

DONE this 17th day of January, 1986, by depositing the same in the United States post office, with first-class postage prepaid, and properly addressed to the Clerk and parties indicated hereinabove on this date.

CERTIFICATE OF FILING

I, E. E. BALL, the attorney for the petitioner, hereby certify that the number of copies of this petition required by Rule 19 of the Supreme Court Rules to be filed, to-wit, an original and forty (40) copies, with the Clerk of the United States Supreme Court, were placed by me in the United States Mail, certified, return receipt requested, first-class postage prepaid, addressed to The Honorable

Alexander Stevas, Clerk of the United States Supreme Court, pursuant to the provisions of Rule 19 of the Supreme Court Rules, on the date indicated below.

E. E. BALL
Attorney for petitioner

Sworn to and subscribed before
me on this 17th day of January, 1986.

Alicia S. Williams
NOTARY PUBLIC, BALDWIN COUNTY, AL
MY COMMISSION EXPIRES: 10-4-89

No. 85-1228

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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I. IN THE CIRCUIT COURT OF THE
28TH JUDICIAL CIRCUIT OF ALABAMA

BALDWIN COUNTY

STATE OF ALABAMA,
Plaintiff,

vs.

BILL BENTON,
Defendant.

CASE NUMBER: CC-84-101

JURY & VERDICT

10/4/84; This day in open Court came the State of Alabama by its District Attorney, and the defendant also in his own proper person, and with his attorney, and the trial of this case having been regularly set for this day, thereupon, in open Court on this day in the presence of the District Attorney, defendant's attorney, and the defendant, came a jury of good and lawful men and women, to-wit: James D. Stallworth, and eleven others, who, having been duly impanelled and sworn according to law, who, having heard the evidence, and the charge of the Court, upon their oaths, in

open court on this day, in the presence of the District Attorney, defendant's attorney, and the defendant, do say: "WE, THE JURY, FIND THE DEFENDANT GUILTY AS CHARGED IN THE INDICTMENT."

It is therefore considered and adjudged by the Court that the Defendant is guilty of the offense of Sale of Controlled Substances, and the Defendant being asked by the Court if he had anything to say why the judgment and sentence of the law should not be passed upon him, requested pre-sentence investigation. Pre-sentence investigation ordered.

SENTENCING

11/29/84; Came the State of Alabama by its District Attorney, came the Defendant also in his own proper person and with his attorney, and defendant having been found guilty of the offense of Sale of Controlled

Substances and having been adjudged guilty of the offense of Sale of Controlled Substances, and being asked by the Court if he had anything to say why the judgment and sentence of the law should not be passed upon him, replied, by his attorney "Judge, I would just like to point out to the Court that the recommendation of the probation officer was for probation, and a number of people that have lived in the same ccmmunity as Mr. Benton have come forward, including Mr. Condie Langham, Mack Yon, an attorney in Mobile, and the list goes on. Judge, he has no prior, including no traffic tickets. He's only twenty-eight years old, and the man has two children. He's a prior law enforcement officer, and he's going to have a lot of trouble in jail, Your Honor."

It is therefore considered and adjudged by the Court that the defendant is guilty of the offense of Sale of Controlled

Substances, and upon recommendation of the District Attorney, the defendant be and he is hereby sentence to Ten (10) years in the State Penitentiary. Appeal bond set at $25,000.00.

II. IN THE ALABAMA COURT OF CRIMINAL APPEALS

BILL BENTON,
Appellant,
vs.
THE STATE,
Appellee,
1 DIV 999

Dear Sir:

You are hereby notified that on August 20, 1985 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama: Appeal affirmed. No opinion. Judgment not final, see Rule 41, ARAP.

MOLLIE JORDAN, CLERK

III. IN THE ALABAMA COURT OF CRIMINAL APPEALS

BILL BENTON,
Appellant,
vs.
THE STATE,
Appellee,
1 DIV 999

Dear Sir:

You are hereby notified that on October 8, 1985 the following indicated action was taken in the above styled cause by the Court of Criminal Appeals of Alabama:

Application for Rehearing overruled. No opinion. Judgment not final, see Rule 41 ARAP.

MOLLIE JORDAN, CLERK

IV. THE STATE OF ALABAMA - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA
November 22, 1985

85-84

EX PARTE: BILL BENTON

PETITION FOR WRIT OF CERTIORARI
(Re: Bill Benton v. State)
CRIMINAL APPEALS 1/999

CERTIFICATE OF JUDGMENT

WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

Costs taxed to petitioner.

JONES, J. - MADDOX DIVISION CONCURS.

CERTIFICATE OF SERVICE

I, E. E. BALL, the attorney for the petitioner, hereby certify that the number of copies of this petition required by Rule 28 of the Supreme Court Rules have been served on the opposing party in this proceeding by mailing three copies of the appendix to the Attorney General of the State of Alabama, by certified mail, return receipt requested, first-class postage prepaid, addressed to The Honorable

Charles A. Graddick, Attorney General of the State of Alabama.

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Alexander Stevas, Clerk of the United States Supreme Court, pursuant to the provisions of Rule 19 of the Supreme Court Rules, on the date indicated below.

E. E. BALL

Sworn to and subscribed before
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NOTARY PUBLIC, BALDWIN COUNTY, AL
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